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Supreme Court, U.S.
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No. 03-1109

IN THE

Supreme Court of the United States

MARVIN FRANDSEN, JAN L. FRANDSEN, BRYAN MORRIS, FRANK J. CERVASIO, MARIANNE CERVASIO, DIAN HARDISON, and TONIANNE WYNER,

Petitioners,

v.

BREVARD COUNTY, FLORIDA, and BREVARD COUNTY SHERIFF PHIL WILLIAMS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITIONERS' SUPPLEMENTAL BRIEF

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Petitioners file this Supplemental Brief regarding a new case that was not available at the time of the Petitioners' last filing:

THE ELEVENTH CIRCUIT'S DECISION IN THIS CASE CONFLICTS WITH A RECENT DECISION OF THE SIXTH CIRCUIT COURT OF APPEALS IN WHICH THE SIXTH CIRCUIT FOUND DE FACTO CONTENT DISCRIMINATION IN AN ANALOGOUS ORDINANCE PURPORTING TO BE NEUTRAL REGARDING CONTENT.

The Sixth Circuit's decision in *Chabad of Southern Ohio v. City of Cincinnati*, 2004 WL 716870 (6th Cir. Apr. 5, 2004), affirmed the issuance of a preliminary injunction against a local government on the basis that the ordinance at issue, although purporting to be a content-neutral law, was actually based on the content of speech and expression because, *inter alia*, the ordinance's stated rationale was to ensure that the speech and expression at issue "appeals to the widest of audiences." 2004 WL 716870 at *5. The Sixth Circuit continued:

> The district court reasoned that "[b]y excluding from the public discourse on Fountain Square speech which would not appeal to 'the widest of audiences,' the City wishes to eliminate speech which might be controversial or offensive to those visiting downtown Cincinnati."

Id. (citation omitted). The ordinance at issue in *Chabad* is analogous to the Brevard County Ordinance in the instant case because Brevard County's stated rationale is to censor expressive nudity as shown by the Ordinance's Findings: "[A]ppearing nude . . . often serves to impose such person's nudity on others who did not seek it out, who are not able to reasonably avoid observing it, and who may be offended or distressed thereby. . . ." 95-21(3)(C). (*See, e.g.*, R84-46-48,92-96, Def. Ex. 3 (County

Commission Meeting Minutes of 5/4/95 and 5/18/95).) The Ordinance's intent to regulate the content of speech is also implicit in its stated intent not to permit conveyance of a message that might be construed by some people that Brevard County is against conservative "family values" and that might deter people from visiting the Kennedy Space Center. *See* Ord. 95-21(3)(M-N). The Ordinance regulates the content of speech because it forbids people "to exploit nudity for profit or commercial gain and to advertise outside of Brevard County and the State of Florida the availability of an opportunity for nudity in public places which are not places provided or set apart for nudity within Brevard County. . . ." *Id.* at (3)(Q). Also, the Ordinance regulates the content of speech because it discourages "the influx into Brevard County of persons seeking to observe and/or participate in such nudity." *Id.* (3)(R). Because all of the examples of content regulation exist in the Brevard County Ordinance, the Eleventh Circuit's failure to find that the Brevard County Ordinance is based on the content of the speech and expression is in direct conflict with the Sixth Circuit's decision in *Chabad*.

Finally, the Brevard County Ordinance is fatally flawed not only because those Findings appear in the Ordinance, but because by the Ordinance's own terms, each and every Finding is not severable because the intent and purpose of the Ordinance are expressly predicated on the facts stated in the Findings. (R1-Ex. A.)

CONCLUSION

The *Chabad* case shows a split between the Sixth and Eleventh Circuits regarding the recognition of an unconstitutional basis for an ordinance where that basis shows intent to restrict the content and/or viewpoint of speech, despite protestations by the government that no such restrictions are intended. The Sixth Circuit's holding would properly necessarily invalidate the Brevard County Ordinance at issue in the instant case as violative of the First Amendment.

Respectfully submitted,

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